Supreme Court, U. S.
FILED
NOV 8 1979
MICHAEL RODAK, JR., CLERK

No. 79-203

In the Supreme Court of the United States

OCTOBER TERM, 1979

GEORGE OCHS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (Pet. App. 41a-64a) is reported at 461 F. Supp. 1. The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 595 F.2d 1247.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1979. A petition for rehearing was denied (Pet. App. 65a) on May 25, 1979. The time

for filing a petition for a writ of certiorari was extended by Mr. Justice Marshall until July 24, 1979, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence obtained by New York City police in a warrantless search of a briefcase located in the rear passenger compartment of an automobile, which the police believed to be stolen and consequently impounded at the time of petitioner's arrest, should have been suppressed.

2. Whether the district court abused its discretion when it refused to sever the trial of the income tax counts of the indictment from the trial of the extortion and obstruction of justice counts.

3. Whether the district court properly instructed the jury on the count of the indictment charging petitioner with endeavoring to influence, intimidate, or impede grand jury witnesses.

4. Whether petitioner's sentence, which was within the statutory maximum, was proper.

STATEMENT

1. After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on all counts of a seven-count indictment (Pet. App. 1a-2a; A. 12a).[1] The indict-

[1] "A." references are to the Joint Appendix filed by the parties in the court of appeals. "I-Tr." references are to the transcript of the suppression hearing held on December 13, 1977. "II-Tr." references are to the transcript of the December 20, 1977, suppression hearing.

ment charged petitioner with using extortionate means to collect extensions of credit, in violation of 18 U.S.C. 894 (Count One), with obstructing justice by endeavoring to influence witnesses subpoenaed to testify before a grand jury, in violation of 18 U.S.C. 1503 (Count Two), with filing false income tax returns for the years 1971 through 1973 in which he claimed dependency exemptions for a nonexistent wife and several nonexistent children, in violation of 26 U.S.C. 7206(1) (Counts Three through Five), with willfully failing to file an income tax return for 1974, in violation of 26 U.S.C. 7203 (Count Six), and with willfully attempting to evade his income taxes for 1974, in violation of 26 U.S.C. 7201 (Count Seven). The district court sentenced petitioner to consecutive terms of imprisonment of seven years on Count One, five years on Count Two, three years each on Counts Three through Five, and two years on Count Seven: a total of 23 years' imprisonment (Pet. App. 2a; A. 12a). The court suspended the imposition of sentence on Count Six, which it regarded as a lesser included offense encompassed by Count Seven (Pet. App. 2a n.1).

The evidence at trial (Pet. App. 1a-2a) established that during the years 1974 through 1976, petitioner owned and operated a New York massage parlor and conducted a loan-sharking business.[2] The evidence

[2] Debbie McElroy, a prostitute employed at petitioner's Studio One Massage Parlor, testified that petitioner threatened to murder her when she failed to make timely payments on a usurious loan which he had made to her (Pet. App. 2a).

also showed that petitioner failed to file an income tax return for 1974 although he had earn more than $25,000 from his illicit activities during that year and owed approximately $5,939 in income taxes. During 1974, petitioner opened several savings accounts in the names of other persons, and during a subsequent grand jury investigation he instructed these persons, who had been subpoenaed as witnesses, not to reveal that they had paid over to him the interest on these accounts. Petitioner stipulated at trial that, although he had claimed income tax exemptions for a spouse and dependent children in 1971, 1972 and 1973, there was no record of his having a wife or any children.[3] Finally, the evidence revealed that petitioner attempted to bribe the two New York City police officers who arrested him and sought to induce them to perjure themselves before the grand jury. Petitioner also approached several other witnesses and instructed them to testify falsely or claim the Fifth Amendment privilege and refuse to testify.

2. Before trial, petitioner filed a motion to suppress evidence that had been obtained by New York City police officers from an unlocked briefcase that they discovered during an inventory search of the automobile that petitioner was using at the time of his arrest (Pet. App. 41a). The facts of the search were as follows. On September 5, 1975, New York City Police Officers John O'Malley and William Kelly were stopped by a security officer at B. Altman's

[3] Friends and business associates testified that they did not know of petitioner's having a wife or any children.

department store who told them that a "ring" of men were engaged in cashing stolen travelers' checks at that store. The security officer stated that a "heavy set male" (I-Tr. 10) had just attempted to obtain a refund on goods that had been purchased from the store the previous day by another member of the ring with stolen travelers' checks. The heavy set male had failed to obtain a refund, however, and had left the store and entered a blue Cadillac that was parked nearby.

The officers approached the blue Cadillac and observed petitioner and another man sitting in the car. As they approached, Officer O'Malley noticed an open knife blade lying on the front seat between the two men. One of the officers opened the car door and quickly seized the knife, which they immediately identified as a gravity knife, possession of which is a crime under New York law (Pet. App. 3a, 45a n.4).[4]

After taking the knife away, the officers ordered petitioner and the other man, Louis Liveo, out of the car. While frisking Liveo, Officer O'Malley noticed a black object on the floor of the car. Thinking it might be a weapon, the officer picked it up and discovered it to be a book of American Express travelers' checks bearing the name O. Grable (Pet. App. 4a, 46a).

[4] Possession of a gravity knife is a misdemeanor under N.Y. Penal Law § 265.00(5) (McKinney 1967), except when possession is by a person who has previously been convicted of a crime, in which case it is a felony. N.Y. Penal Law § 265.02(1) (McKinney Cum. Supp. 1975). Petitioner had five prior criminal convictions at the time of his arrest (Pet. App. 3a-4a n.2).

After administering *Miranda* warnings, the officers asked petitioner who owned the Cadillac, and he told them that it belonged to a friend but he could not tell the officers where the friend was at the time. Petitioner produced a registration certificate for the vehicle bearing the name Otto Narday.[5] Officer O'Malley inspected the document and noticed that the registration had been tampered with (Pet. App. 4a, 46a; I-Tr. 15). Suspicious that the car had been stolen, O'Malley tried to radio the Communications Bureau to inquire about the ownership of the Cadillac, but radio static interfered (Pet. App. 4a, 47a). Petitioner and Liveo were then arrested for possession of the gravity knife and were taken to a nearby police station, where they were held in custody. Still believing that the vehicle had been stolen,[6] Officers O'Malley and Kelly had another officer drive it to the stationhouse, where it was "vouchered" and inventoried under New York City Police Department regulations (I-Tr. 18-19).[7] Among other items, the inventory yielded a .32 caliber starter's pistol, a simulated revolver, a police radio scanning receiver, a B. Altman's sweater, a second book of stolen travelers' checks, and, in the rear passenger compartment, two unlocked briefcases.

[5] Narday, who was one of petitioner's loanshark victims, appeared at the suppression hearing and testified that he had often lent the Cadillac to petitioner (Pet. App. 4a n.3, 46a). The district court disbelieved this testimony in part, and found it probable that petitioner had taken the Cadillac when Narday was unable to meet his loanshark payments (Pet. App. 53a). Under the circumstances, the district court found that the police officers had probable cause to believe that the vehicle was stolen (Pet. App. 47a, 56a, 61a-62a).

[6] The district court noted that the officers were justified in having the vehicle impounded even if the vehicle had not been stolen. It was illegally parked on a busy street during rush hour and was a traffic hazard (Pet. App. 56a). There was also a possibility that Julian Mitchell, the third accomplice in the stolen travelers' check ring, might return and tamper with the vehicle or its contents.

The briefcases were taken into the police station and inventoried without protest in the presence of petitioner, who was in a nearby detention cell (Pet. App. 5a, 48a-49a). One of the briefcases contained four bankbooks, three of which bore names other than petitioner's, as well as other documents that O'Malley immediately recognized as loansharking records and Studio One Massage Parlor prostitution records (Pet. App. 5a-6a, 48a-49a).

3. The district court denied petitioner's motion to suppress the evidence seized from the car. The court held that the search was a proper inventory search following an arrest with probable cause. The court stated (Pet. App. 56a-60a) that the standard inventory procedures used by the New York City police had been approved by courts in several jurisdictions

[7] Officer O'Malley testified that they inventoried the contents of the automobile "[f]or our own personal safety and other officers' safety, to safeguard anything of any value that may be in it for the owner of the property, and to be sure that there could be no false claims made against the police department as far as missing money, jewelry, or anything of that nature. The reason we thumb through everything, it is quite often that there is money, U.S. currency, folded up and placed in between places. The bankbook, for instance, could have money within the pages of it" (II-Tr. 66).

and were of the type approved by this Court in *South Dakota* v. *Opperman*, 428 U.S. 364 (1976).

The court of appeals affirmed, holding that the police officers had probable cause under exigent circumstances to search the contents of the car and that, under this Court's decision in *Chambers* v. *Maroney*, 399 U.S. 42, 50-52 (1970), the New York City police officers had engaged in a permissible investigative search (Pet. App. 8a-12a, 13a-15a).[8] The court rejected petitioner's contention that the warrantless search of the briefcase contained in the automobile was invalid under this Court's decision in *United States* v. *Chadwick*, 433 U.S. 1 (1977). The court observed, moreover, that the search in this case predated *Chadwick* by nearly two years (Pet. App. 12a-13a) and that *Chadwick* was not to be applied retroactively, citing *United States* v. *Reda*, 563 F.2d 510 (2d Cir. 1977), cert. denied, 435 U.S. 973 (1978).[9]

4. Petitioner filed a petition for rehearing, which was denied on May 25, 1979 (Pet. App. 65a). After this Court's decision in *Arkansas* v. *Sanders*, No. 77-1497 (June 20, 1979), petitioner filed a motion to set aside the order denying his petition for rehearing, asking the court of appeals to reconsider its decision in light of *Arkansas* v. *Sanders* (Pet. App. 72a). The government responded to petitioner's motion, arguing that *Sanders*, like *Chadwick*, should not be applied retroactively. The court of appeals thereafter denied petitioner's motion to reconsider the denial of rehearing.

[8] The court of appeals found it unnecessary to rely on the post-arrest inventory rationale on which the district court had based its decision (Pet. App. 13a).

[9] Judge Meskill filed a concurring opinion in which he reasoned that the nonretroactivity of *Chadwick* was a sufficient basis upon which to decide this case. He preferred "to leave exploration of the effect of *Chadwick* on vehicle searches, whether 'inventory' or 'investigative' for a case to which *Chadwick* is clearly applicable" (Pet. App. 35a).

ARGUMENT

1. Petitioner challenges the admission of evidence discovered in the briefcase that was taken from the back seat of the impounded automobile that he had been driving at the time of his arrest. The search of the briefcase was sustained by the district court as a valid inventory search, by the court of appeals majority as a lawful investigative search founded upon probable cause, and by Judge Meskill, concurring, on the ground that the decision in *United States* v. *Chadwick*, *supra*, should not be given retroactive effect.

The question presented by petitioner regarding the search of the briefcase (Pet. 4) concerns its lawfulness under the principles of *Chadwick* and *Arkansas* v. *Sanders*, *supra*. His discussion of the issue is divided into two points: first he contends (Pet. 14-21) that the search was not valid as an investigatory search upon probable cause under the principles of *Chadwick* and *Sanders* and (Pet. 22-28) that those decisions should be given full retroactive application; second he argues (Pet. 30-37) that the inventory search doctrine of *South Dakota* v. *Opperman*, 428 U.S. 364 (1976), should not be construed to permit inventories

of the contents of briefcases or luggage lawfully seized by the police and (Pet. 37-45) that it is improper to sustain the search as a valid investigatory search when it was conducted for inventory and not investigatory purposes. These contentions do not warrant review by this Court in the context of the instant case.

a. There is no occasion for the Court to review this case for the purpose of determining whether a probable cause search of a briefcase seized from an automobile may be undertaken without a warrant; we assume *arguendo* that the court of appeals' majority's conclusion that it may was incorrect in light of *Sanders*. The critical issue is not whether the warrantless search violated the Fourth Amendment but whether, in light of the fact that it took place two years before the decision in *Chadwick* and four years before that in *Sanders*, the teaching of those decisions should be retroactively applied to invalidate this search.

In *United States* v. *Peltier*, 422 U.S. 531 (1975), the Court made clear that decisions declaring certain police practices to be violative of the Fourth Amendment should not be given retroactive effect even though they may not have overruled any prior decision, but simply clarified an unsettled question. There is no suggestion in this case that the officers acted in bad faith or in knowing disregard of their constitutional obligations, and petitioner does not contend that the court's decision here was inconsistent with prior Second Circuit or New York law. Accord-

ingly, as Judge Meskill concluded (Pet. App. 35a-37a), *Peltier* dictates that the evidence seized from petitioner's briefcase was properly admitted at his trial.

Petitioner seeks to distinguish this case from *Peltier* on the ground that *Chadwick* and *Sanders* simply applied settled doctrine and rejected "novel Fourth Amendment principles argued by the Government" (Pet. 23). But the very fact that two outstanding jurists such as Judges Friendly and Mansfield could have concluded, even after *Chadwick*, that no warrant was required plainly belies petitioner's suggestion. Moreover, this Court too, several years before *Chadwick*, recognized this as a controversial and unsettled question. As Mr. Justice Stewart stated in the plurality opinion in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 474-475 (1971) (footnotes omitted):

> Some have argued that a determination by a magistrate of probable cause as a precondition of any search or seizure is so essential that the Fourth Amendment is violated whenever the police might reasonably have obtained a warrant but failed to do so. Others have argued with equal force that a test of reasonableness, applied after the fact of search or seizure when the police attempt to introduce the fruits in evidence, affords ample safeguard for the rights in question, so that "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."
>
> Both sides to the controversy appear to recognize a distinction between searches and seizures that take place on a man's property—his home or

> office—and those carried out elsewhere. It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of "exigent circumstances." As to other kinds of instrusions, however, there has been disagreement about the basic rules to be applied, as our cases concerning automobile searches, electronic surveillance, street searches and administrative searches make clear.

On the authority of this Court's decision in *Peltier*, the courts of appeals generally have concluded that *Chadwick* should not be applied retroactively to invalidate warrantless searches based on probable cause of sealed containers found in a defendant's car at the time of arrest. See, *e.g.*, *United States* v. *Calandrella*, Nos. 78-5341, 78-5342 (6th Cir. Aug. 31, 1979), slip op. 22-28; *United States* v. *Mancillas*, 580 F.2d 1301, 1306-1307 (7th Cir.), cert. denied, 439 U.S. 958 (1978); *United States* v. *Choate*, 576 F.2d 165, 182 n.20 (9th Cir.), cert. denied, 439 U.S. 953 (1978); *United States* v. *Reda*, 563 F.2d 510, 512 (2d Cir. 1977), cert. denied, 435 U.S. 973 (1978); *United States* v. *Montgomery*, 558 F.2d 311, 312 (5th Cir.), cert. denied, 434 U.S. 927 (1977). Only the Eighth Circuit has held that *Chadwick* applies retroactively. *United States* v. *Schleis*, 582 F. 2d 1166, 1173-1174 (1978) (en banc); *United States* v. *Stevie*, 582 F. 2d 1175, 1178 (1978) (en banc), cert. denied, No. 78-971 (June 25, 1979). We did not view the

conflict among the circuits created by *Schleis* and *Stevie* to be sufficiently important to warrant review by this Court, and accordingly did not seek certiorari in them on the *Chadwick* retroactivity issue,[10] and nothing that has occurred since has altered our judgment on this matter. The decision in *Chadwick* is now nearly two and a half years old, and there remain relatively few cases likely to be affected by the retroactivity question.

b. With regard to petitioner's attack upon the inventory search rationale relied upon by the district court, we acknowledge that the issue he presents is one of some substance that was not conclusively settled by *Opperman* (see Pet. 35-37). Nevertheless, it seems plain that this case does not afford a suitable vehicle for resolution of that issue. The court of appeals did not discuss or decide the issue in this case, and this Court too would presumably not have occasion to reach the issue unless it first dealt with the *Chadwick* retroactivity issue and resolved it in petitioner's favor—an undertaking that we believe would not justify expenditure of this Court's limited resources and that, in any event, likely would be resolved adversely to petitioner.

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[10] Contrary to petitioner's suggestion (Pet. 25), the question of the retroactivity of *Chadwick* was not raised in our petition in *Stevie* as a ground upon which review should be granted, and, of course, to the extent the Court considered the issue to be present, it did not see fit to review it. Moreover, the State did not present the issue in its petition in *Sanders*, although the search in that case antedated *Chadwick*, and the Court did not address the issue there.

Petitioner's argument that the court of appeals could not properly sustain the search of the briefcase on an investigatory search rationale when it was undertaken for inventory purposes is easily refuted. This Court made clear in *Scott* v. *United States*, 436 U.S. 128, 136 (1978), that the existence of a constitutional violation "turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time. Subjective intent alone * * * does not make otherwise lawful conduct illegal or unconstitutional." See also *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 455, 458, 464. While in this particular case the officers may not have been relying upon their right under New York and Second Circuit law at the time to conduct a warrantless investigatory search under these circumstances, since they believed their acts to be a lawful inventory search, the retroactivity of Fourth Amendment decisions cannot, at least in the absence of bad faith, turn upon the subjective beliefs of the officers conducting a particular search regarding the source of their authority to do so.[11]

2. Petitioner contends (Pet. 46-58) that joinder of the counts charging tax violations (Counts Three through Seven) with the extortion and obstruction of

[11] Here, the officers were not only acting in accordance with established Police Department procedures, but against a background of New York and Second Circuit law upholding warrantless searches of closed containers seized from impounded vehicles. *E.g.*, *United States* v. *Zaicek*, 519 F.2d 412, 413-415 (2d Cir. 1975); *United States* v. *Tramunti*, 513 F.2d 1087, 1100 (2d Cir.), cert. denied, 423 U.S. 832 (1975); *People* v. *Sullivan*, 29 N.Y.2d 69, 272 N.E. 2d 464, 323 N.Y.S. 2d 945 (1971).

justice counts (Counts One and Two) was improper under Rule 8(a) and prejudicial under Rule 14 of the Federal Rules of Criminal Procedure. These contentions are not substantial.

Rule 8(a) permits the joinder of offenses where they "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." The court of appeals correctly held that, if the joinder of counts in this case was improper under Rule 8 (a), it was harmless error and affords no basis for reversal of petitioner's conviction (Pet. App. 26a-27a n.11).[12] The court correctly noted that much of the evidence tending to prove the various charges would have been admissible at separate trials even if the counts had been severed. See, *e.g.*, *United States* v. *Turbide*, 558 F.2d 1053, 1061-1062 (2d Cir.), cert. denied, 434 U.S. 934 (1977). For example, evidence concerning the loansharking and extortion charge of Count One was necessary to establish the amount and source of petitioner's income for the purpose of proving

[12] Petitioner challenges (Pet. 46-48) the court of appeals' conclusion (Pet. App. 26a n.11) that he "did not raise the question of misjoinder" under Rule 8(a). He claims that he preserved his Rule 8 objection in the district court (Pet. App. 74a-75a) and was not foreclosed from raising it on appeal. But the court was concerned with petitioner's failure on appeal to raise a claim under Rule 8(a) (see Appellant's Br. 30-34) along with his claim for severance from prejudicial joinder under Rule 14. The court of appeals correctly found that, having failed to preserve the claim on appeal, petitioner had abandoned his claim of misjoinder under Rule 8(a).

his income tax violations (Counts Six and Seven), and, in this sense, these counts were connected by a "common scheme or plan." See *Baker* v. *United States*, 401 F.2d 958, 971-974 (D.C. Cir. 1968), cert. denied, 400 U.S. 965 (1970). Evidence concerning the false income tax return counts (Counts Three through Five) concerned "similar" offenses (Rule 8(a)) for different income tax years and would thus have been admissible to show willfulness or lack of mistake on the other tax counts. Similarly, evidence that petitioner obstructed justice (Count Two) would have been admissible to show consciousness of guilt, lack of mistake, and intent as to all of the income tax counts (Counts Three through Seven). See *United States* v. *Ritch*, 583 F.2d 1179 (1st Cir.), cert. denied, 439 U.S. 970 (1978). The proof as to all of the counts was thus interrelated and overlapping (Pet. App. 27a n.11), and any misjoinder of the tax counts under Rule 8 was harmless (*ibid.*).

Rule 14 provides, in pertinent part, that "[i]f it appears that a defendant or the government is prejudiced by a joinder of offenses * * * in an indictment * * * the court may order an election or separate trials of counts * * * or provide whatever other relief justice requires." For the same reason that the joinder of offenses was harmless under Rule 8, the court of appeals correctly concluded that petitioner had failed to establish that he suffered substantial prejudice from the joinder of the offenses under Rule 14. See *United States* v. *Niederberger*, 580 F.2d 63, 66-67 (3d Cir.), cert. denied, 439 U.S. 980 (1978).

The district court thus did not abuse its discretion in refusing to sever the counts for separate trials.

3. Petitioner claims (Pet. 59-66) that the district court failed properly to instruct the jury that obstruction of justice must be done "corruptly" to constitute an offense under 18 U.S.C. 1503.[13] Petitioner failed to object to this portion of the charge at trial; he claims here that the alleged defect in the charge was plain error. The court of appeals correctly ruled, however, that the charge, viewed as a whole, clearly and adequately apprised the jury that it was necessary to find that petitioner had acted "corruptly" in attempting to influence the testimony of grand jury witnesses (Pet. App. 30a-31a).[14] Con-

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[13] 18 U.S.C. 1503 provides in pertinent part:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States * * * shall be fined * * * or imprisoned * * *.

[14] In the questioned portion of the charge the court stated (A. 121a-122a) (emphasis supplied):

> The indictment specifically charges the defendant with "corruptly" endeavoring to influence the designated witness or witnesses. *The word "corruptly" does not add an additional element to the crime.*
>
> I charge you as a matter of law that any unauthorized endeavor to influence a witness in the performance of his duty to testify violates the law. It is the endeavor, not the corruption, which is the gist of the crime.

But elsewhere in its charge the district court made it clear that "corruptly" was an element of the crime. Thus, the trial court advised the jury (A. 120a-121a):

> * * * The defendant must corruptly endeavor, that is deliberately and by his action, to influence the witness to

sidered in the context of the trial and the other portions of the charge, the jury instruction was not plain error affecting petitioner's substantial rights. See *United States* v. *Park*, 421 U.S. 658, 674-676 (1975).

4. Petitioner contends (Pet. 67-76) that his sentence was improper because imposing a cumulative sentence of nine years on three false income tax return counts (Counts Three through Five) and an additional 12 years on the extortion and obstruction of justice counts (Counts One and Two) was illogical and inconsistent.

But petitioner received a sentence on each count that was within the statutory maximum. " 'If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits

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testify falsely, evasively, or to corruptly have the witness assert their [*sic*] Fifth Amendment privilege when otherwise they would testify.

The law is designed to prevent a miscarriage of justice by corrupt methods. The statute extends to any corrupt endeavor to interfere with the presentation of matters to a grand jury.

Moreover, the court added immediately after the challenged instruction that (A. 122a)

[a]ny * * * endeavor, whether successful or not, which is made for the purpose of corruptly influencing a witness is condemned.

Viewed as a whole these instructions adequately apprised the jury that it was necessary to find that petitioner had acted "corruptly" in order to find him guilty of obstructing justice in Count Two.

allowed by a statute.' " *Dorzynski* v. *United States*, 418 U.S. 424, 440-441 (1974), quoting *Gurera* v. *United States*, 40 F.2d 338, 340-341 (8th Cir. 1930). See *Gore* v. *United States*, 357 U.S. 386, 393 (1958). Moreover, the court of appeals noted that the petitioner had an extensive record of criminal convictions (Pet. App. 32a-33a), and petitioner does not challenge the propriety of any information considered by the court in imposing his sentence. Compare *United States* v. *Tucker*, 404 U.S. 443, 446-447 (1972). The district court did not act beyond its discretion in imposing sentence, for, as the court of appeals found, on this record the district judge could reasonably have imposed a greater cumulative sentence than he in fact did (Pet. App. 33a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1979

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